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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

ISRAEL ACKERMAN,

Defendant and Appellant.

D076768

(Super. Ct. No. SCD271741)

APPEAL from an order of the Superior Court of San Diego County, Amalia Meza, Judge. Affirmed.

Sheila O'Connor, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Lance E. Winters, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Charles C. Ragland, Alana Butler and Amanda Lloyd, Deputy Attorneys General, for Plaintiff and Respondent.

In a previous appeal, we remanded this case to the trial court to allow the court to consider Ackerman's motion to strike the serious felony prior conviction in the

furtherance of justice. On remand, the trial court denied the motion and this appeal follows.

### PROCEDURAL BACKGROUND

A jury convicted Israel Ackerman of attempted voluntary manslaughter (Pen. Code,<sup>1</sup> §§ 192, subd. (a) and 664; count 1), making criminal threats (§ 422; count 2), and assault with a deadly weapon (§ 245, subd. (a)(1); count 3). The jury found the use of a knife and great bodily injury enhancements true as to counts 1 and 3. Ackerman admitted a strike prior (§ 667, subds. (b)-(i)) and a serious felony prior (§ 667, subd. (a)(1)).

At the sentencing hearing, the court denied the defense motion to strike the "strike prior" and sentenced Ackerman to a determinate term of 20 years in prison.

Ackerman appealed, and this court reversed the conviction in count 2 and remanded the case for resentencing in light of recent statutory amendments to section 1385, which would permit the court to exercise its discretion to strike the serious felony prior if appropriate. (*People v. Ackerman* (Apr. 10, 2019, D073260) [nonpub. opn.].)

The court held a resentencing hearing on remand. After reviewing moving and opposing materials and hearing argument, the court found it would not be in the furtherance of justice to strike the prior under section 1385. The court denied the motion and reinstated the previous sentence.

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<sup>1</sup> Further statutory references are to the Penal Code unless otherwise indicated.

Ackerman filed a timely notice of appeal.<sup>2</sup>

## DISCUSSION

In this appeal, Ackerman challenges the trial court's denial of his motion as an abuse of discretion. He contends the trial court did not fully understand the scope of its discretion because it treated Ackerman's postjudgment behavior as irrelevant to the motion to strike the prior. Respectfully, the court did nothing of the kind. As we will discuss below, the court was fully aware of its discretion and its duty to consider the offense, the defendant's circumstances, and the interests of justice. The court was well informed of the progress Ackerman had made in the few years he had been in prison.<sup>3</sup> We will find no abuse of discretion here.

### A. The Sentencing Hearing

Both sides submitted written briefs supporting and opposing striking the serious felony prior. Ackerman emphasized the age of the prior (2002); his current age (45); his prior drug addiction, which he has been addressing; the circumstances of the crime; and his desire to reunite with his family.

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<sup>2</sup> The facts of the offenses are fully set forth in our prior opinion. We will not repeat them here. (*People v. Ackerman, supra*, D073260.)

<sup>3</sup> Somewhat like the saying that "no good deed goes unpunished," here the court's encouraging remarks to the defendant, followed by the court's statement it had to follow the law are being construed to mean the court found Ackerman's positive steps during his approximately two years in prison to be irrelevant. That is not a reasonable interpretation of the court's remarks. The comment, in context, merely means that as good as such late behavior may be, it is not enough to outweigh the facts of the offense and the defendant's lengthy criminal history in determining what is in the furtherance of justice.

The trial court read the moving and opposing papers. It recognized the matter had been remanded specifically for it to be able to exercise its discretion under the newly amended section 1385. The court's own words are the best indicator of the court's understanding of the scope of its discretion. We quote from the transcript:

"THE COURT:· Thank you for your comments.· The matter is here for re-sentencing of the sentence that I gave Mr. Ackerman of 20 years' prison, included a five-year serious felony prior, and Senate Bill 1393, which became effective this year, made the enhancement discretionary so the Appellate Court, which reviewed the entire case, remanded this matter, this case back to the Trial Court so I could exercise my discretion under Penal Code [section] 1385 as to the enhancement.

"It specifically stated it expressed no opinion as to how the Trial Court should exercise its discretion. Penal Code [section] 1385 provides that, 'A judge in furtherance of justice may strike an enhancement and that the reasons shall be stated orally on the record and in the minutes of the hearing.'

"I'm told from the authority that the decision to strike a prior conviction is an individualized one based on the particular aspects of the current offense and based on the defendant's own history and personal circumstances, so I looked at the particular aspects of this case. This case involved great violence and planning. The defendant used a ladder to enter an apartment and wage a surprise attack on the victim. He rushed the victim with a knife, and the victim sustained several stab wounds and cuts. To this day the defendant claims he does not even remember entering the apartment.

"Then I look at, as I'm supposed to, the serious felony prior that is the basis for this remand, and the defendant is requesting for this Court to strike the serious felony prior for a carjacking he committed in 2002, and the facts are that the victim was driving his vehicle when the defendant opened the door and jumped inside. He ended up stabbing the victim and drove away in the victim's car. The defendant was driving the victim's car at the time he was arrested and the knife was found in his waistband.

"His criminal history dates back over twenty years. In the months leading up to this offense, the defendant violated a domestic-violence restraining order when he sent harassing and threatening text messages to the mother of his children.

"So the defendant committed this offense three years after he was discharged from parole in the carjacking case, and this offense marks the second time the defendant has been convicted of an offense in which he stabbed a—his victim with a knife and in both instances, the defendant stabbed his victim when they were in their own property. In the carjacking, the victim was in his own car, and in this case, the victim was in an apartment that was owned by his family.

"In both instances, the defendant entered the victim's property and attacked his victims with a knife.

"The Court has exercised its discretion under Penal Code [section] 1385 and declines to strike the enhancement. It concludes it would not be in the furtherance of justice to strike the enhancement. I do commend Mr. Ackerman for all that he's doing in prison to improve himself and to make amends for his crimes, but I must follow the law as I am required to do under Penal Code [section] 1385."

## B. Legal Principles

Trial courts have broad discretion in sentencing decisions. In cases where the court grants or denies a motion to strike a prior conviction under section 1385, we will review that decision under the abuse of discretion standard of review. The party that challenges such decision has the burden to show the decision is irrational or arbitrary. (*People v. Carmony* (2004) 33 Cal.4th 367, 375.)

When a court exercises its discretion on a motion to strike a prior conviction, it should consider the nature of the offense, the defendant's background and criminal history and the person's prospects. (*People v. Williams* (1998) 17 Cal.4th 148, 161.) If

the decision is to be made in a resentencing hearing, the defendant's behavior since the original sentencing is a relevant factor for the court's consideration. (*People v. Bullock* (1994) 26 Cal.App.4th 985, 990.)

A defendant has the right to be sentenced by a court that is fully informed of the nature and scope of its discretionary authority. (*People v. Gutierrez* (2014) 58 Cal.4th 1354, 1391. We presume the trial court performed its official duty as required. (Evid. Code, § 664; *People v. Sullivan* (2007) 151 Cal.App.4th 524, 549.)

### C. Analysis

The court's remarks at sentencing clearly show the judge considered Ackerman's background, the nature of the current offense, the nature of the prior offense and his long and extensive criminal history. Ackerman's steps toward rehabilitation during the two years between conviction and resentencing were explored at length in the hearing and in written submission which the court read and considered. The court did not even hint it thought his efforts were irrelevant. Indeed, the court commended him for the efforts so far.

Here, Ackerman had a criminal history dating back to 1994. His strike and serious felony priors were both from a 2002 carjacking in which the victim was stabbed by Ackerman. The court expressed serious concern that Ackerman had again used a knife to stab his victim. Clearly Ackerman has been violent and dangerous. He was only off parole for about three years before his latest felony.

We agree Ackerman's conduct in prison was both relevant and laudable and should have been considered by the court. Applying the presumption of Evidence Code

section 664, and viewing the judge's statements in context, we are satisfied the court did not ignore the positive information the defense presented. It was simply not enough to outweigh the nature of the offense and the defendant's history to the point that striking the prior would be in the furtherance of justice. The trial judge did not abuse its discretion.

#### DISPOSITION

The order denying Ackerman's motion to strike the serious felony prior conviction is affirmed.

HUFFMAN, J.

WE CONCUR:

McCONNELL, P. J.

IRION, J.